

## Legal Newsflash

### Topical Update from Robin Simon LLP

# FRAUDULENT MISREPRESENTATION - A Cautionary Tale

#### *Fitzroy Robinson Ltd v Mentmore Towers Limited Others [2009] EWHC 1552 (TCC)*

The Technology and Construction Court's recent decision in *Fitzroy Robinson Ltd v Mentmore Towers Limited and Others* produced the startling and unusual outcome whereby firm of Architects was found to have made a fraudulent misrepresentation by failing to inform its client that, shortly before entering into contracts, the project leader for that contract had resigned and would not therefore be available throughout the project.

The case also analysed whether the agreed monthly payment instalments of a lump sum fee should be adjusted to take account of delay to the project.

#### **The Claim**

Fitzroy Robinson Limited ("FRL") was engaged to act as architect for an ambitious scheme to develop the In & Out Club on Piccadilly and Mentmore Towers, the former home of the Rothschild family in Buckinghamshire.

The client companies were particularly keen to engage the services of one specific FRL director whose reputation and experience was one of the principal reasons for the clients to come to FRL in the first place. He was involved in all the pre-contract negotiations and was to act as project leader. In the thick of the contract negotiations this director handed in his resignation.

FRL did not tell the clients that their "key player" was leaving and would not be continuously involved throughout the project contrary to what the clients had originally been told to expect. Formal contracts were signed later.

The clients were eventually told about the resignation. Despite their obvious disappointment, works continued albeit, with a number of delays. The clients eventually suspended the projects, leaving FRL with over £1,500,000 worth of fee instalments unpaid.

FRL commenced a fee claim and the clients hit back with defences and counterclaims, which amongst other things alleged that FRL had made a fraudulent misrepresentation

because they failed to inform them that the project leader had resigned.

On the evidence the Court decided:

- The representation that the particular director would be continuously involved in the project had been made on several occasions.
- Having that particular director as project leader was plainly designed to induce the clients to enter contracts with FRL. FRL were the most expensive of the architects who tendered for the scheme and had the clients known of the resignation they would not have chosen to work with FRL.
- The misrepresentation was made knowingly and deliberately and without an honest belief in its truth and was therefore fraudulent:

*“there was a false representation which was deliberate, and made for a specific purpose: to ensure FRL got the job”*

- The clients should have been told about the resignation before the contracts were signed and it was dishonest not to have done so.

### **What was the damage?**

Luckily for FRL the damages in this particular case are likely to be limited. The clients claimed damages in relation to disruption and duplication as a result of the director's departure. The court found no real evidence of such loss, save for the costs of another FRL director coming “up to speed” so FRL would have to bear that cost.

The judgement does, however, serve as a warning. In this case it was found that the delay to the project had nothing to do with the director's departure. If, however, evidence had been introduced to the contrary FRL might have been looking at a costly counterclaim.

### **The Fee Entitlement**

The Judge carefully examined the appointment terms and the schedule of fees and found that the contract terms permitted adjustments to the monthly fee instalments to reflect delays to the programme and the services actually performed. By the date of suspension, it was clear that FRL were “ahead of themselves” in terms of invoicing compared with the actual services performed.

### **The Moral of the Story**

The case serves as a stark reminder of the difference between playing these situations with a straight bat and fraudulently seeking to gain an unfair commercial advantage. It underlines the importance of informing clients of any changes in circumstances concerning ‘key personnel’ as soon as possible to avoid unwelcome misrepresentation allegations and claims.

Furthermore, this was a claim where the Judge had to decide which of the two key witnesses was telling the truth. The Judge found important parts of one of the witnesses’

evidence:

*“...incorrect, misleading, inaccurate, unfair and, in at least one case, knowingly untrue”*

The Judge lamented the absence of any attempt at ADR:

*“...so as to avoid my findings on these issues being made being made in a public Judgement.”*

According to the Judge the facts of this particular case were not atypical:

*“It is, in my experience relatively rare in the construction industry for the promised involvement of one particular member of a large professional team to be so clearly and obviously the major reason why a contract is placed with a particular company or firm”*

Well, maybe.....

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